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No. 82-1482

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,
Petitioner,

v.

TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK AND GREAT-WEST LIFE ASSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER FOR A WRIT OF CERTIORARI

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A. INTRODUCTION.

This case classicly poses an extremely important question of federal law: whether parol evidence admitted under a state evidentiary rule may be used to establish offsets to an employee benefit plan and thereby negate the requirement of ERISA[1] that the plan be

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[1] The same abbreviated references as were used in the Petition for Certiorari will be used in this brief.

administered in accordance with a written plan document which specifies the basis on which payments are to be made to and from the plan.[2]

It is the petitioner's position that even state evidentiary rules must yield when they conflict with preemptive federal law. In opposing the petition for certiorari, the respondents chose not to contest this proposition. Rather, they attempted to restate the facts and recast the issue in a more favorable light.

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[2]Because this issue is so clearly posed by the pertinent documents, the petitioner has requested that the Clerk of the Eleventh Circuit Court of Appeals forward certified copies of the following excerpts from the record: (i) the application submitted by Trust Company to Great-West; (ii) the May 1, 1979, letter from Great-West to Trust Company accepting the application; (iii) the Northwestern National plan which expired April 30, 1979; and (iv) the initial draft of the Great-West plan dated "7/12/79" (meaning December 7, 1979).

B. THE FACTS.

In their statement of facts, the respondents glossed over the fact that the District Court established offsets against the petitioner's basic benefits purely by the use of parol evidence. The respondents assert that when the disability plan was changed from Northwestern National to Great-West:

> "[I]t is undisputed that there was a complete meeting of the minds between Trust Company and Great-West with regard to the provisions of the Plan; the agreement was that the existing Northwestern plan document's benefit provisions (including the offsets for Income from Other Sources) would continue to apply." Opposition Brief of Great-West, at 7; See also Opposition Brief of Trust Company, at 4 and 6.

This assertion ignores the salient facts. The Northwestern document was between different parties. It did not continue in effect, but, as the District Court concluded, it "expired by its own terms on April 30, 1979." Despite this, the respondents failed to memorialize

their "undisputed intention" in the Great-West application for insurance, in the letter from Great-West to Trust Company accepting the application or in any other writing. Later, the respondents apparently encountered difficulty in expressing this "undisputed intention" as the "benefit provisions" set forth in the initial draft of the Great-West plan bore no resemblance, either in form or in substance, to the provisions of the Northwestern plan. Finally, the Great-West plan was substantively different from the Northwestern plan in its core provisions relating to eligibility, benefit amounts, and funding. The only document which reflected these changes and contained the four elements required by ERISA for a plan was the Great-West application. Myron v. Trust Company Bank Long-Term Disability Benefit Plan, 522 F.Supp. 511, 516-517 (N.D.Ga. 1981).

The respondents imply in their statement of facts (but do not state) that the Great-West application contains references to the Northwestern offset provisions. They do this by stating:

> "The pages from the Northwestern plan document defining offsets for income from other sources apparently were inadvertently omitted from the attachments to [the application]... The Application does contain references to "income from other sources" but that term is not defined within the Application itself." Opposition Brief of Great-West at 6; See also Opposition Brief of Trust Company, at 6.

The fact is, there is absolutely no evidence, parol or otherwise, that anyone intended to attach to the application copies of the pages containing offset provisions from the Northwestern plan. The words "Income from Other Sources" which appear in the application do not expressly refer to and have not been specifically linked by parol evidence to any offsets or any portion of the Northwestern plan.

The opinion of the District Court on this point is quite clear. The Court noted at one point that, "there is also no mention of any offset provisions in the application..." and at another point that, "there is admittedly no reference to these [offset] provisions...." Myron, supra, 522 F.Supp. at 517-18.

C. THE ISSUE.

The respondents attempted to recast the issue posed by the petition for certiorari as follows:

> "The Petitioner has mis-characterized the holding below by implying that the Eleventh Circuit and the District Court concluded that the Georgia parol evidence rule superseded ERISA so that a plan required to be in writing under ERISA need not actually be in writing. To the contrary, the courts below held only that an employer's ERISA plan need not be contained solely within the confines of a single document, and that undisputed parol evidence could be used to determine which documents constituted the entire plan." Opposition Brief of Great-West, at 8 (original emphasis); See also Opposition Brief of Trust Company, at 8.

The plan "determined" by the District Court through the use of parol evidence consists of the application which was signed by Trust Company and accepted by Great-West and of an excerpt from the expired Northwestern plan relating to offsets. Yet, the application contained no reference to offsets and did not refer to or incorporate that portion of the prior plan.

If parol evidence may be used to construct a plan from bits and pieces of an expired plan between different parties, then no participant's benefits are secure. See Snyder v. Titus, 513 F.Supp. 926 (E.D.Va. 1981) and citations in footnote 4 of Petitioner's Application for Certiorari at 12. The point is simply this: the linkage of the offsets to the Great-West plan was purely parol. The offset provisions of any other plan or policy could have been similarly linked by parol.

The parol linkage of provisions in different writings which are not connected by internal references to one another is as contradictory to the requirement of a writing as the actual establishment of the terms of a provision by parol. For this reason, as noted in the Application for Certiorari, the general Georgia rule is that documents comprising a contract governed by the Statute of Frauds may not be linked by parol evidence, but must be "internally connected [and] intelligible without parol aid." Freeman v. Baker, 147 Ga. App. 168, 169, 248 S.E.2d 298 (1978) and citations in footnote 7 of Petitioner's Application for Certiorari at 16.[3]

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[3]The petitioner always contended below that ERISA precluded the court from looking beyond the application to determine plan provisions. The petitioner also contended that the Georgia parol evidence rule, when properly applied, produced the same result.

Under ERISA, there is no reason that a plan cannot be contained in more than one document so long as the documents are unambiguously adopted by an internal cross-reference.

It is true, as noted by Great-West, "[t]hat private parties, not the Government, control the level of benefits" of employee benefit plans. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981), quoted in Opposition Brief of Trust Company at 10. But, this does not mean that private parties are free to establish the level of benefits through the use of parol evidence after a claim is filed. Under ERISA, the level of benefits must be selected in advance and clearly delineated in a written plan.

The District Court's use of parol evidence to establish offsets to the disability plan, and reduce the petitioner's benefits, undermines both the

express requirements and the spirit of ERISA. Affected plan participants will rarely be in a position to contest parol evidence establishing the level of benefits purportedly "intended" by plan sponsors. The evidence will be controlled by the parties whose interests are furthered by the discriminatory establishment of benefit levels. Courts will be forced to access the credibility of such evidence in a vacuum. The decision opens the door to discrimination and abusive practices and thus has far-reaching implications. As that is the case, the conflicting state law must yield to its preempting federal legislation.

D. CONCLUSION.

For the reasons set forth above and in the petition, the petition for certiorari should be granted.

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